UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

WDC ACQUISITION, LLC and District Lodge 6, International Association of Machinists And USW/AFL-CIO/CLC and USW GMP Counsel 17B	Case No. 18-CA-220488 18-CA-224086 18-CA-224176 18-CA-235532 18-CA-238129 18-CA-238193 18-CA-238883

TABLE OF CONTENTS

RESPONDENT'S REPLY TO POST HEARING BRIEF

General Counsel's brief ignores the teachings of *Ridgewood Health Care* that a distressed business "must undergo fundamental and immediate changes in employment terms to survive." *Ridgewood Health Care Ctr., Inc.,* 367 NLRB No. 110 (Apr. 2, 2019). Unlike *Ridgewood*

Health Care WDC Acquisition, LLC ("WDC") did not refuse to hire employees because of union affiliation. After offering employment to all former Wellman Dynamics employees, WDC bargained less than six weeks after a request was made. A "bargaining order" was and is unnecessary given WDC's agreement to bargain with the three unions. Enforcing General Counsel's suggested remedies ignores well-settled precedent and principles of fairness.

THERE WAS NO FORFEITURE.

General Counsel admits WDC is *not* a perfectly clear successor, and therefore, all parties agree WDC is entitled to set the initial terms and conditions of employment. GC Brief 7, fn. 5. General Counsel alleges forfeiture based upon pre- and post-transition statements by James Mahoney ("Mahoney"), Aaron Brammer ("Brammer"), and Terry McKinney ("McKinney"). To disrupt WDC's right to set such terms, General Counsel must prove forfeiture. General Counsel failed to carry its burden leaving WDC's right to set initial terms and conditions of employment undisturbed. Based on WDC's right to set the initial terms, the allegations regarding the attendance policy, Deborah Graham's termination of employment, and the bathroom break policy should be resolved in WDC's favor.

Mahoney unequivocally testified that he communicated the truth to the employees—the buyer of Wellman's assets out of bankruptcy would not assume the three collective bargaining agreements. Tr. 520:14-19. Mahoney communicated the basic legal reality to employees that much "like a garage sale," the asset buyer was entitled to "buy what they want and [ ] leave behind what they don't want." Tr. 520:2-10. General Counsel argues Mahoney did not specifically deny the five (5) allegations made by various employees (GC Brief 9-10). However, Mahoney could not have been clearer:

> Q. Did you ever tell employees there would never be a union in the facility with the new owner?

A. **No. Categorically not.** Because I understood very clearly the difference between not assuming an agreement and—which was a present circumstance, versus bargaining in a future state in the new company.

Tr. 521: 25-522:5 (emphasis added).

Mahoney's testimony is unequivocal--he did not tell employees there would never be a union. General Counsel now suggests this Court determine Mahoney is a liar. To undermine a witness' testimony, cross-examination is required. Critically, General Counsel did not cross-examine Mahoney. Not one question. Tr. 535:8-9. Mahoney is the alleged source of the pre- and post-transition statements. Mahoney decisively testified what he said and what he meant. If General Counsel wants to argue that Mahoney's testimony was false, the veracity of such testimony should have been, and could have been, tested under cross-examination; a failure to do so suggests acquiescence with Mahoney's firm denial. *See Advo System, Inc.*, 297 NLRB 926, 932 (N.L.R.B. 1990) (in discussing whether additional witnesses should be called to buttress or corroborate the unequivocal testimony of a witness with first-hand information, the ALJ stated (and the Board adopted), "Respondent notes that none of the crew was called to substantiate her testimony. **But this was a matter for cross-examination** with regard to the loudness or softness of White's questions and how far away the rest of the crew was and what they were doing. Respondent **chose not to inquire of this; instead, at the hearing, by his silence, he appeared to acquiesce** in Meredith's assertion that the other crew members were occupied and might not have heard her conversation with White. In any event, her fellow crew members were equally available to Respondent.").

Failing to effectively cross-examine Mahoney, General Counsel asks this Court to draw an adverse inference because WDC did not call redundant witnesses to testify in accord with Mahoney. General Counsel relies upon *Electrical Workers Local 3* for the notion that this Court

should draw an adverse inference. GC Brief 12. In *Electrical Workers Local 3*, the Board affirmed the ALJ's refusal to draw an adverse inference noting that there was conflicting testimony about what was said at a meeting, and the Court can determine who was telling the truth from the testimony at trial, and that the other individuals who would corroborate one side of the conflicting testimony were equally available to both parties such that there was no reason to presume they would testify favorable to one side or another. *Electrical Workers Local 3*, 329 NLRB 34 at *4, n. 1 (emphasizing the proper inquiry with an adverse inference is whether there is sufficient information to assume the witness would be favorably disposed to that party).

The challenged statements were not made during private meetings. Mahoney is alleged to have made these statements in a public forum in a "town hall meeting." There is no legal support for the notion that to avoid an adverse inference a party must call every single participant in employee-wide meetings to go on record as to what they recall from meetings. Mahoney's statements were at issue, and he testified unequivocally. It bears emphasis, Mahoney is no longer employed at WDC and testified voluntarily via the internet/skype from his hotel room in Saudi Arabia where he was on business. As a former employee, Mahoney is even more credible. As WDC previewed in its opening statement, there was testimony that Mahoney said there would not be a union *contract*. This Court can reconcile the employee testimony with Mahoney's testimony insofar as WDC was purchased without WDC assuming the union agreements, a right WDC was afforded under the Bankruptcy Code. For instance, Lyle Burton testified, "there would not be a union, they weren't accepting the union" – this is a shorthand understanding of Mahoney's testimony—the new owner was not buying the union contracts as a part of the asset sale. GC Brief 10. Employee Jerry Novak testified that Mahoney said "no" when asked if there would unions; again, Mahoney admits that he told the employees the objective truth—the union

contracts would not be in place with the new owners. GC Brief 10. Novak's recall that Mahoney said, "no" is compatible, albeit a misunderstanding, of Mahoney's statement. The remaining employee testimony relates to Mahoney's attempts to infuse positive morale. Statements suggesting the employees not worry about the lack of union contracts because they would be "respected as employees" is further evidence of Mahoney's intent to keep employee morale high and to communicate openly with employees during the transition. GC Brief 9. Statements like "no need for union representation" and "if there was a union, that means [I] not only failed the company, but [] failed the employees" are again reconciled with Mahoney's testimony that he attempted to explain to the employees that there would be no union contracts, but that they should not be concerned. *See* Tr. 523:7-9 (Mahoney testifying about his concerns in early May as the company transitioned: "And we had a workforce that was apprehensive themselves about understanding what are the circumstances of employment under the new business.").

Mahoney explained his concern that there was vast "uncertainty" among the employees, his precise testimony was that "uncertainty was the headline word". Tr. 524:10-19. Mahoney testified that he tried to communicate with the employees his aspiration to "create a culture and business that didn't repeat the mistakes of the past" and that three separate contracts was evidence of a dysfunctional labor-management relationship. Tr. 524:10-19. These are not statements of anti-union sentiments.

Further, General Counsel relies on a strange story wherein Brammer allegedly talked to employee Kyle Vogel ("Vogel") at Vogel's house while they were engaged in a car repair and there was a "secret meeting that there wouldn't be unions after the new company took over." GC Brief 11. First, an employee, supervisory or not, gossiping to a co-worker off work, at that employee's home, while the two engaged in other business (Brammer was paying to have his

auto serviced) certainly disrupts any imputed agency. Second, again, this comports with the objective truth—when the new company takes over, there would be no union contracts. General Counsel emphasized that now-former employee Brammer did not testify. Notwithstanding that Brammer was a supervisor at Wellman Dynamics, he is no longer with WDC, and as a former employee is certainly deemed neutral and there is no basis to assume that he would testify in favor of his prior employer. *Electrical Workers Local 3*, 329 NLRB 34 at *4, n. 1; Tr. 136:12-22. There is no legal support to draw an adverse inference.

Additionally, General Counsel alleges McKinney made antiunion statements to employees in the trim room. A single employee testified that McKinney made such statements and threw away a union book. This entire story is contradicted by the careful training put in place by WDC as shown by Respondent's Exhibit C. WDC trained its supervisors to respect the boundaries with discussion about the union and candidly shared information through Mahoney. General Counsel also argues that Amy Reed was allegedly present for McKinney's comments and did not deny them. Ms. Reed testified that Respondent's Exhibit C was the message delivered to the managers and supervisors regarding the unions. Tr. 568-69. General Counsel did not cross-examine Ms. Reed on this issue, and therefore, cannot argue that a lack of cross is now affirmative proof.

Certainly, the statements of Mahoney, Brammer, and McKinney concerning the objective truth—that there was no union contract with the buyer-- and Mahoney's attempts to assuage employee concerns are not the facts that predicate forfeiture of successor rights. The Board declined to find forfeiture on the following facts in *Ridgewood Heath Care*:

- misleading employees, pre-transition, that "everything would remain the same";
- falsely stating there would be "minimal changes";
- falsely stating "wages and benefits would essentially stay the same";

- the President stating that the new owner would "have to recognize the Union and honor its contract" which did not occur;
- discriminatorily refusing to hire four individuals based on unsustainable pretext that there discharged from another facility after stringing them along and interviewing them;
- asking employees during interviews if they were union members;
- threatening an employee with termination if she recruited union members;
- and threatening to close the facility if employees unionized.

367 NLRB No. 110, at *17 (dissent).

Like here, there was an allegation that the respondent stated unions were not necessary. *Id*. at 1. The Board affirmed these factual findings as it relates to discriminatory non-hiring, threats, and antiunion behavior. *Id*. at 6. The Board correctly ruled that the respondent in *Ridgewood Health Care* was entitled to set initial terms and conditions, notwithstanding this anti-union behavior. Simply, the greater includes the lessor—here, WDC is accused of a fraction of what was present in *Ridgewood Health Care*, thus, even if true, the facts do not merit forfeiture. *See id.* at 11-12.

General Counsel refuses to reconcile their argument about *Advanced Stretchforming* with the clear mandate from the Board's more recent decision in *Ridgewood Health Care*. The General Counsel inaccurately states *Ridgewood Health Care* did not include pre-transition statements and suggests that a successor employer can undertake one of the most chilling actions of discriminatory refusal to hire employees to avoid union obligations and still maintain its *Burns* rights, but also undertake lessor actions like making statements that there will be "no unions" and be subject to forfeiture.[1] This argument lacks total credence. Under the reasoning in *Ridgewood*

[1] The General Counsel attempts to divine the Board's "interest" in reconsidering legal issues. *See* GC Brief 16, n. 9. Since *Ridgewood Health Care* was decided in April of 2019, it has been cited by the Board. *See Valley Hosp. Med. Ctr., Inc. d/b/a Valley Hosp. Med. Ctr. and Loc. Jt. Exec. Bd. of Las Vegas*, 368 NLRB No. 139 at * 14, n. 2 (N.L.R.B. Dec. 16, 2019) (dissent) (including *Ridgewood Health Care* in a string of decisions where the Board allowed employers to maintain their rights, absent violations of the Act). Board Member McFerran, in a number of dissenting

Health Care, this Court should find WDC was a successor employer entitled to set initial terms and conditions and that General Counsel failed to prove forfeiture is appropriate.

WDC WAS EXCUSED FROM BARGAINING; IMMEDIATELY COMMENCED BARGAINING; AND HAS A CONTRACT WITH AT LEAST ONE UNIT.

General Counsel urges WDC did not carry its burden to prove a good faith basis existed to avoid bargaining. First, WDC did carry its burden with uncontroverted evidence of a good faith basis, but even if it did not, there is no reason to issue an order compelling bargaining because WDC commenced bargaining. In fact, WDC has a ratified agreement with one of the three unions. It is undisputed that WDC did not bargain from May 14, 2018 until August 6, 2018. Mahoney testified that over the course of weeks, innumerable employees expressed their negative opinions regarding the unions. Mahoney was not cross-examined as to who those employees were. If the General Counsel wishes to now argue that Mahoney was dishonest in that recitation, it should have tested the veracity of his statements with cross-examination and demand that Mahoney state the employees' names. Such employee(s) could have been subpoenaed for impeachment. Having failed to do so, and having clear, uncontroverted evidence on the record, WDC proved it was legally excused from bargaining. The remedy is an order to bargain, and WDC has already commenced bargaining. Further, even if WDC was required to bargain, the fact that WDC was entitled to set the initial terms and conditions of employment, this brief delay in bargaining was harmless.

---

opinions, articulates that the Board's recent decisions, like that in *Ridgewood Health Care* as a "new approach" which certainly supports WDC's argument that *Ridgewood Health Care* overruled prior agency law.

AS AN EMPLOYER, WDC IS ENTITLED TO MAKE MANAGEMENT DECISIONS.

A. Ben Ingersoll was Not Targeted and the Union Pass was a Continuation of Policy.

Employee Ben Ingersoll ("Ingersoll") was not targeted by WDC. The only testimony that he was came from discredited witness April Melroy. Melroy testified to a tall tale that was immediately undercut by her own email exchanges wherein it confirmed that Melroy was never instructed to draft termination paperwork and every witness who testified after Melroy denied any such plan was in action. General Counsel's reliance on this discredited witness demonstrates the lack of proof of retaliation against Ingersoll.

The union pass was a continuation of business policies, not a "change" such that bargaining was required. *See Raytheon Network Centric Sys.*, 365 NLRB No. 161 (N.L.R.B. Dec. 15, 2017) (an employer's action that does not alter the status quo is not a "change" requiring bargaining). "The Board and the courts--interpreting *Katz*--have repeatedly held that employers can lawfully take such actions [affecting wages, hours, benefits, and other employment terms] without bargaining if doing so does not constitute a 'change.'" *Id.* The Board embraces the regular, everyday meaning of "change" meaning "when an employer acts consistently with what it did before, this is not a 'change.'" *Id.*

There was no "change". Ingersoll was *reminded* to obtain permission before engaging in union business by way of a memorandum, GC Exhibit 111. Later, the union pass was discussed as a method to guard against confusion that was generated by obtaining verbal permission. General Counsel has not shown how a continuation of prior policy was a material change in any way. In fact, on cross-examination, Ingersoll admitted that while the union pass may have created some delay, prior to the union pass, there was delay in union business too. Tr. 336:13-

337:24. Stacy Anderson similarly testified that the parties had always followed the language in Exhibit 2, section 4. Tr. 66:6-17. In section 4, the old contract stated that visitation during business hours was to be arranged by, and limited by, the company. Here, using a sheet of paper was not a material change from the prior practice, and there was no violation of the Act. It is also not proof that Ingersoll was targeted. The argument suggesting Ingersoll was treated differently because IAM did not have a union pass readily fails; this procedure did not apply to the IAM because there are approximately 7 members of the IAM and they work in a defined space, unlike Ingersoll who had to travel around the plant to interact with unit members. Tr. 335:2-17.

B. Scheduling overtime is within management's authority.

Start times for overtime have varied wildly. Accordingly, changes to the Saturday start time is not something for negotiations or mandatory bargaining. *See id.*; Tr. 564:7-19. Crystal Mack testified that overtime depends on the needs of the work and could be at 4 a.m., 5 a.m., or 6 a.m. Currently, it is 5 or 6 a.m. during the weekends and 4 a.m. during the week.

THERE WAS NO RETALIATION ON MARCH 22, 2019.

The Iowa Hawkeyes played a first-round day game (11 a.m. CST) in the NCAA basketball tournament on March 22, 2019 against the Cincinnati Bearcats and narrowly prevailed. That same day, in the hours leading up to the game, employees started calling off and calling in using "emergency PTO" that was to be used for "emergency use, like bad weather, short-term sickness, [and] situations like that." Tr. 62:1-4. With concerns about safety and efficiently with a struggling company, it was decided to send employees home until the operations could be properly resumed. Tr. 478:21-25. General Counsel's argument that this occurred on the heels of heated bargaining is undermined by the basketball game. A suspicious timing argument that is being used to suggest WDC's justification was pretext is only persuasive

if there is a lack of other explanation to explain why employees were sent home close in time after there was bargaining about the PTO.

CONCLUSION

Much of the charge is resolved by deciding that WDC was legally entitled to set initial terms and conditions, a legal right conceded by General Counsel. General Counsel failed to prove sufficient justification for stripping away that legal right, particularly as it relates to a struggling business striving to emerge from bankruptcy for the second time. General Counsel blindly seeks orders to bargain, without concern for the fact that the parties have been bargaining for over 18 months. There was no retaliation; employees have been treated fairly and consistently during a very stressful and precarious time. This fairness preserves their livelihoods and comports with agency law that management can enforce the status quo without mandatory bargaining. Labor laws are intended to balance the rights and curtail practices which harm both workers and businesses. This economic reality was emphasized in *Ridgewood Health Care* and applies with equal force to WDC. Accordingly, WDC respectfully requests the Court dismiss the charges herein and take no further action.

Gene R. La Suer, AT0004440
Michele L. Brott, AT0010068
DAVIS, BROWN, KOEHN, SHORS
& ROBERTS, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: GeneLaSuer@davisbrownlaw.com
Email: MicheleBrott@davisbrownlaw.com
ATTORNEYS FOR WDC ACQUISITION, LLC

Copies to:

Jennifer A. Hadsell
Regional Director
National Labor Relations Board
Region 18
Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, MN 55401-2647

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on **January 14, 2020** by:

__ U.S. Mail
__ Hand Delivered
__ Federal Express
__ FAX
__ Overnight Courier
X Other: E-Filing

Signature: